STATE OF MICHIGAN

COURT OF APPEALS

ERIC DARCEL JONES, Plaintiff/Appellant-Cross Appellee, v BEACON HARBOR HOMES, INC., Defendant/Appellee-Cross Appellant.	UNPUBLISHED March 1, 2011 No. 293789 Saginaw Circuit Court LC No. 07-066147-NZ
ERIC DARCEL JONES, Plaintiff-Appellee, v BEACON HARBOR HOMES, INC., Defendant-Appellant.	No. 294550 Saginaw Circuit Court LC No. 07-066147-NZ

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

In Docket No. 293789, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). The trial court held that plaintiff failed to create a genuine issue of material fact that he was disabled under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, or that defendant perceived him to be disabled. In Docket No. 294550, defendant appeals as of right the trial court's order denying in part its motion for attorney fees and costs. While the trial court granted costs to defendant, it denied an award of attorney fees because it found that plaintiff's claims were not frivolous. We affirm in Docket No. 293789. We affirm in part, reverse in part, and remand in Docket No. 294550.

I. DOCKET NO. 293789

Plaintiff argues that the trial court erred in granting summary disposition to defendant because he presented evidence that he was disabled or that defendant perceived him as being disabled. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In reviewing a motion brought under MCR 2.116(C)(10), we consider the affidavits, depositions, pleadings, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

The PWDCRA prohibits discrimination against individuals because of their handicapped status. *Peden v Detroit*, 470 Mich 195, 203; 680 NW2d 857 (2004). The act prohibits employers from taking specified adverse employment actions "against an individual 'because of a disability . . . that is unrelated [or not directly related] to the individual's ability to perform the duties or a particular job or position.'" *Id.* at 203-204, quoting MCL 37.1202(1)(a)-(e). "To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must demonstrate (1) that [he] is disabled as defined by the PWDCRA, (2) that the disability is unrelated to [his] ability to perform the duties of a particular job, and (3) that [he] was discriminated against in one of the ways described in the statute." *Lown v JJ Eaton Place*, 235 Mich App 721, 727; 598 NW2d 633 (1999).

The PWDCRA defines a "disability" as:

> (i) "[a] determinable physical or mental characteristic of an individual . . . if the characteristic . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position . . . "; (ii) "[a] history of [such a] determinable physical or mental characteristic . . . "; or (iii) "[b]eing regarded as having [such a] determinable physical or mental characteristic . . . ." [*Peden*, 470 Mich at 204, quoting MCL 37.1103(d).]

"Whether an impairment substantially limits a major life activity is determined in light of (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term effect." *Lown*, 235 Mich App at 728. "It is not enough that an impairment affect a major life activity; the plaintiff must proffer evidence from which a reasonable inference can be drawn that such activity is substantially or materially limiting." *Id.* at 731 (internal quotation marks and citation omitted). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 217; 559 NW2d 61 (1996) (internal quotation marks and citations omitted).

The trial court did not err in concluding that plaintiff failed to present evidence that he was disabled under the PWDCRA. Intermittent, episodic impairments are generally not disabilities. *Lown*, 235 Mich App at 733. A back injury of limited duration is not commonly

considered a disability. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 479 n 6; 606 NW2d 398 (1999). Here, plaintiff was diagnosed with deteriorating discs, but he admitted that any physical effects from his back condition are intermittent and temporary. When his back "flares up," his mobility is affected, but he is fine when not suffering from a flare up. Plaintiff was able to work three days a week for defendant, and was working without any restrictions at his current job. He had not suffered a flare up in approximately four months. While we do not doubt that plaintiff's back condition was at times painful, it does not qualify as a disability under the PWDCRA.

The PWDCRA also provides protection from employment discrimination for individuals "regarded as having [such a] determinable physical or mental characteristic." MCL 37.1103(d)(iii). In order to succeed on a claim for a perceived disability, a plaintiff must prove:

> (1) the plaintiff was regarded as having a determinable physical or mental characteristic; (2) the perceived characteristic was regarded as substantially limiting one or more of the plaintiff's major life activities; and (3) the perceived characteristic was regarded as being unrelated either to the plaintiff's ability to perform the duties of a particular job or position or to the plaintiff's qualifications for employment or promotion. [*Michalski v Reuven Bar Levav*, 463 Mich 723, 732; 625 NW2d 754 (2001).]

Here, defendant was aware of plaintiff's back condition. Plaintiff testified that he informed defendant of his back condition, and defendant received a note from plaintiff's physician. Defendant allowed plaintiff to work three days a week. However, plaintiff has not demonstrated that "the perceived characteristic was regarded [by defendant] as substantially limiting one or more of the plaintiff's major life activities." Plaintiff presented no evidence indicating that defendant thought that plaintiff's back condition was an ongoing disability or prevented him from performing his job responsibilities the three days that he did work. Plaintiff relies on the fact that he could not provide answers to questions from defendant's president about how long he needed to work three days a week, but yet plaintiff admitted that defendant had a right to know when he could return to a five-day work week. We find no error in the trial court's determination that plaintiff failed to establish a genuine issue of material fact regarding whether defendant perceived him to be disabled.

We affirm the trial court's order granting summary disposition to defendant. Given our holding that plaintiff failed to present evidence that he was disabled or was perceived to be disabled by defendant, we need not consider defendant's argument that the trial court erred in finding that a genuine issue of material fact existed regarding whether defendant's legitimate reason for terminating plaintiff's employment was a pretext for discrimination.

II. DOCKET NO. 294550

Defendant argues that the trial court erred in determining that plaintiff's claims were not frivolous. We agree in part and disagree in part.

A trial court's finding whether a claim was frivolous will not be reversed unless it was clearly erroneous. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 423; 668 NW2d 199

(2003). A "decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed." *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

An attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed. MCR 2.114(D); *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). Filing a signed document that is not well grounded in fact and law subjects an attorney to sanctions. MCR 2.114(E); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 407; 651 NW2d 756 (2002). An appropriate sanction may include an order to pay the opposing party the amount of reasonable attorney fees that resulted from the filing of the frivolous document. MCR 2.114(E).

Likewise, MCL 600.2591(1) entitles a prevailing party to recover attorney fees and costs incurred in connection with a frivolous action. A frivolous action is one where" [t]he party's primary purpose in initiating the action . . . was to harass, embarrass, or injure the prevailing party," "[t]he party had no reasonable basis to believe that the facts underlying the party's position were in fact true," or "[t]he party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a). Whether a claim is frivolous depends on the facts of the case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). The mere fact that a plaintiff does not ultimately prevail does not render the complaint frivolous. *Id.*

Defendant asserts that plaintiff's claim for a violation of the PWDCRA was devoid of legal merit because caselaw demonstrated that plaintiff was not disabled under the PWDCRA. Plaintiff had a back condition that caused intermittent mobility problems and, as a general rule, intermittent, episodic impairments are not disabilities. *Lown*, 235 Mich App at 733. However, whether plaintiff's back condition could be considered a disability was determined in part by the nature and severity of the impairment, *id.* at 731, which was arguably in dispute. Plaintiff's bad back did limit major life activities, but was just not of a nature or duration substantial enough to be considered a disability under the PWDCRA. Therefore, the trial court did not clearly err in finding that plaintiff's PWDCRA claim was not devoid of arguable legal merit.

However, the trial court clearly erred by not finding plaintiff's claim for a public policy violation to be frivolous. An employer may not discharge an employee because the employee filed a claim for worker's compensation benefits. MCL 418.301(11); *Wilson v Acacia Park Cemetery Ass'n*, 162 Mich App 638, 645; 413 NW2d 79 (1987). However, as established by caselaw, an employer is not prohibited by statute or public policy from discharging an employee who it anticipates may file a claim for worker's compensation benefits. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 666-669; 473 NW2d 790 (1991); *Ashworth v Jefferson Screw Prod, Inc*, 176 Mich App 737, 745-746; 440 NW2d 101 (1989); *Wilson*, 162 Mich App at 645-646. At his deposition, plaintiff acknowledged that he had never filed a claim for worker's compensation benefits. The record is unclear if plaintiff's counsel knew this at the time the complaint was signed, but a reasonable inquiry directed at plaintiff would have revealed the fact. Based on caselaw, the inquiry should have been made. However, plaintiff's counsel's statements

at the hearing on defendant's motion for attorney fees made clear that plaintiff's counsel was unaware of the caselaw. At the hearing, plaintiff's counsel specifically stated that it was not true that a worker's compensation retaliation claim required the employee to have actually filed a claim for worker's compensation benefits.[1] A reasonable inquiry into the legal and factual basis of plaintiff's public policy violation claim would have revealed that the claim had no merit. Because plaintiff's claim for a public policy violation was frivolous, we reverse in part the trial court's order denying defendant's request for attorney fees and remand for imposition of an appropriate sanction.[2]

Affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jane M. Beckering

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[1] Plaintiff's counsel made this statement after he had received a letter from defendant's counsel informing him that there was no cause of action for a violation of public policy based on the termination of an employee in anticipation of the employee filing a claim for workers' compensation benefits. The letter included a citation to the *Ashworth* case. Defendant's counsel stated that if plaintiff would not concur in a dismissal of the public policy violation claim that defendant would request attorney fees and costs.

[2] Both the trial court and plaintiff cite to the case evaluation award in favor of plaintiff as evidence that plaintiff's claims were meritorious. However, case evaluation panels operate with limited information and time; therefore, evidence of a case evaluation award does not persuasively establish that a claim was not frivolous. *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 170 n 7; 712 NW2d 731 (2005).